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BEFORE THE  
BOARD OF PODIATRIC MEDICINE  
STATE OF CALIFORNIA

In the Matter of the Accusation ) NO. 1B-90-7372  
Against: )

BARRY E. WEINER, D.P.M.  
3701 J Street, Suite 100  
Sacramento, California 95618

ACCUSATION

Doctor of Podiatric Medicine  
License No. E-2459,

Respondent.

Comes now complainant James Rathlesberger, who as  
causes for disciplinary action, alleges:

PARTIES

1. Complainant is the Executive Officer of the Board  
of Podiatric Medicine ("Board") and makes and files this  
accusation solely in his official capacity.

LICENSE STATUS

2. On or about June 18, 1979, Doctor of Podiatric  
Medicine License No. E-2459 was issued by the Board to Barry E.

/ / /

1 Weiner, D.P.M. ("respondent"), and at all times relevant herein,  
2 said license was, and currently is, in full force and effect.

3 JURISDICTION

4           3. This accusation is made in reference to the  
5 following statutes of the California Business and Professions  
6 Code ("Code"):

7           A. Section 2497 provides that the board may order the  
8 denial of an application for, or the suspension of, or the  
9 revocation of, or the imposition of probationary conditions upon,  
10 a certificate to practice podiatric medicine for any of the  
11 causes set forth in Article 12 (commencing with section 2220) in  
12 accordance with Section 2222.

13           B. Section 2222 provides, in pertinent part, that the  
14 acts of unprofessional conduct or other violations proscribed by  
15 the Medical Practice Act are applicable to licensed doctors of  
16 podiatric medicine, and that the Board of Podiatric Medicine  
17 shall enforce them with respect to podiatry certificate holders.

18           C. Section 2227 provides that the board may revoke,  
19 suspend for a period of not to exceed one year, or place on  
20 probation, the license of any licensee who has been found guilty  
21 under the Medical Practice Act.

22           D. Section 2234 provides that unprofessional conduct  
23 includes, but is not limited to, following:

24           "(b) Gross negligence.

25           (c) Repeated negligent acts.

26           (d) Incompetence."

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1           E. Section 725 provides that clearly excessive  
2 prescribing or administering of drugs or treatment, repeated acts  
3 of clearly excessive use of diagnostic procedure, or repeated  
4 acts of clearly excessive use of diagnostic or treatment  
5 facilities as determined by the standard of the community of  
6 licensees is unprofessional conduct for a podiatrist.

7           Any person who engages in repeated acts of clearly  
8 excessive prescribing or administering of drugs or treatment is  
9 guilty of a misdemeanor and shall be punished by a fine of not  
10 less than one hundred dollars (\$100) nor more than six hundred  
11 dollars (\$600), or by imprisonment for a term of not less than 60  
12 days nor more than 180 days, or by both the fine and  
13 imprisonment.

14           F. Section 2497.5 provides in part that the board may  
15 request the administrative law judge, under his or her proposed  
16 decision in resolution of a disciplinary proceeding before the  
17 board, to direct any licensee found guilty of unprofessional  
18 conduct to pay to the board a sum not to exceed the actual and  
19 reasonable costs of the investigation and prosecution of the  
20 case.

21 CHARGES AND ALLEGATIONS

22           4. Patient Jil T.:

23           A. In or about 1976, Ms. T. underwent a  
24 calcaneonavicular bar resection of the right foot. The following  
25 year she had the same operation performed on the left foot, at  
26 Samuel Merritt Hospital in Oakland, California.

27 / / /

1           B. In or about 1984, Ms. T. began developing  
2 stiffness, a decreased range of motion in the left foot, and  
3 difficulty with running. She treated these problems with soaking  
4 her foot, taking aspirin and wearing tennis shoes.

5           C. In or about October of 1986, Ms. T. was referred to  
6 respondent by her family practitioner, because of a painful fifth  
7 toe on the left foot.

8           D. On October 28, 1986, Ms. T. was first seen by  
9 respondent. Her chief complaint was a painful corn on the little  
10 toe on the left foot that she had had for about one year. She  
11 also complained of stiffness and throbbing in the left ankle.  
12 Respondent found a muscle spasticity in the left lower extremity,  
13 decreased subtalar joint range of motion with inversion and pain  
14 in the sinus tarsi of the left foot. His diagnosis was 1)  
15 hammertoe 5th left foot, 2) rule out calcaneonavicular bar left  
16 foot, and 3) muscle splinting left foot. There was no treatment  
17 rendered on that day.

18           E. On November 4, 1986, Ms. T. returned to  
19 respondent's office to review the x-rays and for a pre-operative  
20 evaluation. Also on this date, respondent obtained a consent  
21 from Ms. T. to perform an excision, calcaneonavicular coalition,  
22 left foot, and an arthroplasty, proximal interphalangeal joint  
23 5th toe, on the left foot.

24           F. The patient underwent surgery on November 6, 1987.  
25 In the operative report respondent states that he removed enough  
26 bone to create a 3 to 4 cm. gap between the calcaneus and the  
27 navicular.

1           G. On November 19, 1986, respondent's chart notes  
2 indicate that Ms. T. called his office complaining that her left  
3 foot had been "locking up" for five days.

4           H. Ms. T. saw respondent the next day. His chart  
5 notes indicate that he thought her sharp pain was consistent with  
6 an ossicle seen on x-ray. He gave her a sinus tarsi injection.

7           I. On November 21, 1986, the medical record indicates  
8 that respondent informed Ms. T. that he felt that her pain was  
9 due to a bone fragment on the medial aspect of the calcaneus, in  
10 the area of the sinus tarsi. He explained to her that he was  
11 unsure whether it was caused by the recent surgical procedure or  
12 due to the regrowth of the bar. He arranged for her to undergo a  
13 tomogram.

14           J. The tomogram indicated a small bony ossicle  
15 inferior to the anterior portion of the talus posterior to the  
16 navicular and superior to the calcaneus. The fragment was  
17 approximately 5 by 3 mm.

18           K. On November 26, 1986, Ms. T. underwent a second  
19 surgery for the excision of a loose bony fragment of the subtalar  
20 joint on the left foot. Following surgery, a short leg walking  
21 cast was applied.

22           L. On December 22, 1986, Ms. T. began to complain to  
23 respondent that she had increased pain in the area of the  
24 calcaneocuboid joint of the left foot. Respondent's findings  
25 described pain with direct palpation in the area of the incision.  
26 His impression was a sural nerve entrapment in the scar. He does  
27 not describe in his notes any findings which are consistent with

1 a nerve entrapment. He recommended home physical therapy anti-  
2 inflammatory medicines.

3 M. On December 30, 1986, Ms. T. continued to complain  
4 of pain particularly in the area of the calcaneocuboid joint.  
5 Respondent diagnosed a possible "misalignment of the cuboid." He  
6 applied a Low Dye strap.

7 N. On January 5, 1987, Ms. T. was placed in a  
8 fiberglass cast which was to remain on for three weeks, however,  
9 it was removed on January 14, 1987, and she was placed into a  
10 soft cast. According to respondent's notes, at this time, she  
11 had complete relief and was pain free.

12 O. On or about January 19, 1987, Ms. T. again  
13 complained of pain in her left foot. Respondent's examination  
14 revealed severe pain with palpation of the calcaneocuboid area.  
15 There was no relief with manipulation of the calcaneocuboid  
16 joint. He felt that the cuboid was "subluxed and internally  
17 rotated." There is no indication in the chart that x-rays were  
18 taken. Respondent indicated that he believed that complete  
19 integrity of the calcaneocuboid joint had been lost. His  
20 impression at that time was "chronic subluxing cuboid with  
21 arthropathy of the calcaneocuboid joint." His record indicated  
22 that his recommendation was conservative treatment. Ms. T. "just  
23 wanted it fixed" and therefore he recommended calcaneocuboid  
24 joint arthrodesis.

25 P. On January 28, 1987, respondent performed a fusion  
26 of the calcaneocuboid joint of the left foot. In the operative  
27 report, respondent mentions an x-ray which revealed a subluxed

1 calcaneocuboid joint with rotation of the axis of the cuboid.

2 The surgical procedure was apparently uneventful.

3 Q. On February 12, 1987, the surgical sutures were  
4 removed. X-rays were taken and revealed no particular problems.  
5 A slight gap in the area of the calcaneocuboid joint was noted.  
6 Respondent's note reads, "the K-wire was unremarkable and there  
7 was good range of motion." The joint in which good range of  
8 motion was detected was not identified by respondent. Ms. T. was  
9 again placed into a nonweightbearing cast. A later added note  
10 indicates that there was no infection on this date.

11 R. On March 3, 1987, the cast and K-wire were removed.  
12 X-rays were taken. There was no mention in respondent's note of  
13 the x-ray findings. There was minimal tenderness over the  
14 calcaneocuboid joint area. She was placed into a walking cast  
15 with a cast shoe.

16 S. On March 30, 1987, according to respondent's notes,  
17 Ms. T. was doing well. She was released to activities and shoe  
18 gear to tolerance.

19 T. On April 17, 1987, Ms. T. was having severe pain  
20 and swelling in her left foot. X-rays revealed a "1-1/2 mm. gap  
21 between the calcaneus and the cuboid." Respondent mentioned that  
22 x-rays taken on a flat lateral on her heel did not appreciably  
23 move the gap. She was presented with treatment options of  
24 electrical stimulation and bone stimulator. She agreed to the  
25 electrical stimulation. She was also started on Nalfon.

26 U. On April 20, 1987, Ms. T. was apparently pain free.

27 / / /

1           V. On June 25, 1987, Ms. T. was placed in a below the  
2 knee cast and continued using the bone stimulator.

3           W. On October 5, 1987, Ms. T. was complaining of  
4 aching in her foot and the inability to walk on it. She also  
5 complained of a lump over the lateral aspect of the  
6 calcaneocuboid joint. Respondent felt the lump was consistent  
7 with protrusion of the staple. He was unable to perform x-rays  
8 due to time constraints. However, the note indicates that "laser  
9 therapy was accomplished."

10          X. On October 23, 1987, Ms. T. underwent refusion of  
11 the calcaneocuboid joint performed by respondent. The operative  
12 report mentions x-rays which revealed failed fusion of the  
13 calcaneocuboid joint with movement of the staple. The operative  
14 report describes removal of the staple. Visualization of a  
15 fracture on the "plantar one third aspect of the cuboid" was  
16 noted. The fracture apparently was directed "straight down" to  
17 the plantar aspect of the cuboid. A small fragment was removed  
18 and used as an autologous bone graft. The calcaneus and cuboid  
19 were then approximated and fixated with two Kirschner wires. A  
20 second procedure was performed, which consisted of excision of a  
21 nerve tumor, left foot, lateral aspect of the intermediate  
22 dorsocutaneous nerve. No mention is made of the nerve being a  
23 problem other than on respondent's progress note dated December  
24 1, 1986. A short-leg cast was applied to the left leg in the  
25 operating room.

26          Y. On November 12, 1987, Ms. T. was in respondent's  
27 office for a cast change. At that time, he noted a pin track



1 irritation, however, he was unable to culture the small amount of  
2 fluid that was present.

3           Z. On November 17, 1987, Ms. T. returned to  
4 respondent's office for a follow-up appointment. His note  
5 indicates that the wound was improved. The track infection  
6 seemed to be improved since Ms. T. had been taking Keflex. This  
7 was the only mention of his use of antibiotics in this patient.  
8 There is no indication of the antibiotic dosage, the frequency of  
9 administration or the duration of treatment. A short-leg cast  
10 was applied and she was again instructed to remain nonweight  
11 bearing.

12           AA. On December 16, 1987, her cast was removed and her  
13 foot was x-rayed. No mention of the x-ray findings are contained  
14 in the chart. There was no tenderness on examination and she had  
15 increased range of motion. She was given a fracture brace and  
16 instructed to increase her activity level to tolerance. This is  
17 the last entry note in respondent's medical records concerning  
18 Ms. T.

19           BB. On July 18, 1988, Ms. T. sought treatment from an  
20 orthopedic surgeon, Dr. Y. After physical examination and review  
21 of x-rays, Dr. Y. recommended that he would like to obtain her  
22 medical records, previous x-rays and possibly order special  
23 imaging studies for a complete evaluation. He felt that she may  
24 require a triple arthrodesis (fusion of the calcaneocuboid,  
25 talocalcaneal and talonavicular joints) as a salvage procedure.

26           CC. Ms. T. required further surgery to repair her foot  
27 problems.

1 DD. This case was reported to the board due to a  
2 litigation settlement in the amount of \$65,000 paid by respondent  
3 to Ms. T.

4 5. Respondent has subjected his license to  
5 disciplinary action under California Business and Professions  
6 Code sections 2220, 2227 and 2234 on the grounds of  
7 unprofessional conduct, as defined by section 2234 (b) of the  
8 Code in that he is guilty of gross negligence in the practice of  
9 his profession as more particularly alleged hereinafter:

10 A. Paragraph 4, above, is incorporated by reference  
11 and realleged as if fully set forth herein.

12 B. Respondent is guilty of gross negligence in his  
13 care and treatment of patient Jil T. Said gross negligence  
14 includes, but is not limited to, the following:

15 (1) Respondent failed to provide Ms. T. with  
16 conservative treatment prior to her first surgery;

17 (2) Respondent failed to perform an adequate  
18 diagnostic work-up prior to any of her four surgeries;

19 (3) Respondent failed to maintain the patient non-  
20 weightbearing following both of his failed fusion attempts;  
21 and

22 (4) Respondent failed to properly manage the patient's  
23 infection.

24 6. Respondent has subjected his license to  
25 disciplinary action under California Business and Professions  
26 Code sections 2220, 2227 and 2234 on the grounds of  
27 unprofessional conduct, as defined by section 2234 (c) of the

1 Code in that he is guilty of repeated negligent acts in the  
2 practice of his profession as more particularly alleged  
3 hereinafter:

4 A. Paragraph 4, above, is incorporated by reference  
5 and realleged as if fully set forth herein.

6 B. Respondent is guilty of repeated negligent acts in  
7 his care and treatment of patient Jil T. Said negligent acts  
8 include, but are not limited to, the following:

9 (1) Respondent failed to provide Ms. T. with  
10 conservative treatment prior to her first surgery;

11 (2) Respondent failed to perform an adequate  
12 diagnostic work-up prior to any of her four surgeries;

13 (3) Respondent failed to maintain the patient non-  
14 weightbearing following both of his failed fusion attempts;  
15 and

16 (4) Respondent failed to properly manage the patient's  
17 infection.

18 7. Respondent has subjected his license to  
19 disciplinary action under California Business and Professions  
20 Code sections 2220, 2227 and 2234 on the grounds of  
21 unprofessional conduct, as defined by section 2234 (d) of the  
22 Code in that he is guilty of incompetence in the practice of his  
23 profession as more particularly alleged hereinafter:

24 A. Paragraph 4, above, is incorporated by reference  
25 and realleged as if fully set forth herein.

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1 B. Respondent is guilty of incompetence in his care  
2 and treatment of patient Jil T. Said incompetence included, but  
3 was not limited to, the following:

4 (1) Respondent failed to provide Ms. T. with  
5 conservative treatment prior to her first surgery;

6 (2) Respondent failed to perform an adequate  
7 diagnostic work-up prior to any of her four surgeries;

8 (3) Respondent failed to maintain the patient non-  
9 weightbearing following both of his failed fusion attempts;  
10 and

11 (4) Respondent failed to properly manage the patient's  
12 infection.

13 9. Respondent has subjected his license to  
14 disciplinary action under California Business and Professions  
15 Code sections 2220, 2227 and 2234 on the grounds of  
16 unprofessional conduct, as defined by section 725 of the Code in  
17 that he has committed repeated acts of clearly excessive  
18 prescribing of medications and treatments in the practice of his  
19 profession as more particularly alleged hereinafter:

20 A. Paragraph 4, above, is incorporated by reference  
21 and realleged as if fully set forth herein.

22 B. Respondent is guilty of clearly excessive  
23 prescribing in his care and treatment of patient Jil T. Said  
24 clearly excessive prescribing included, but was not limited to,  
25 the following:

26 (1) The patient underwent her first surgery by  
27 respondent only after being treated by him for one week; and

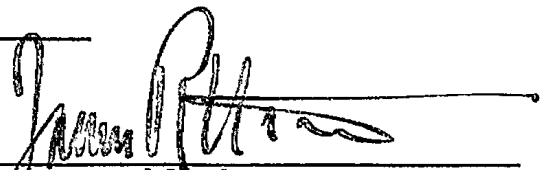
1 (2) Respondent performed four surgeries on this  
2 patient within one year without adequately working her up  
3 prior to any of the four surgeries.

4 PRAYER

5 WHEREFORE, complainant requests that the Board hold a  
6 hearing on the matters alleged herein, and that following said  
7 hearing, the Board issue a decision:

- 8 1. Revoking or suspending Doctor of Podiatric  
9 Medicine License Number E-2459, heretofore issued  
10 to respondent Barry E. Weiner, D.P.M.;
- 11 2. Granting the board its costs in the investigation  
12 and prosecution of this case; and
- 13 3 Taking such other and further action as the Board  
14 deems appropriate to protect the public health,  
15 safety and welfare.

16 DATED: October 12, 1994

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18 \_\_\_\_\_  
19 James Rathlesberger  
20 Executive Officer  
21 Board of Podiatric Medicine  
22 State of California

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24  
25  
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27  
Complainant